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WILLEY, Clerk

SUPREME COURT OF THE UNITED STATES

October term, 1952

Goodman, et al.
Petitioners

v.

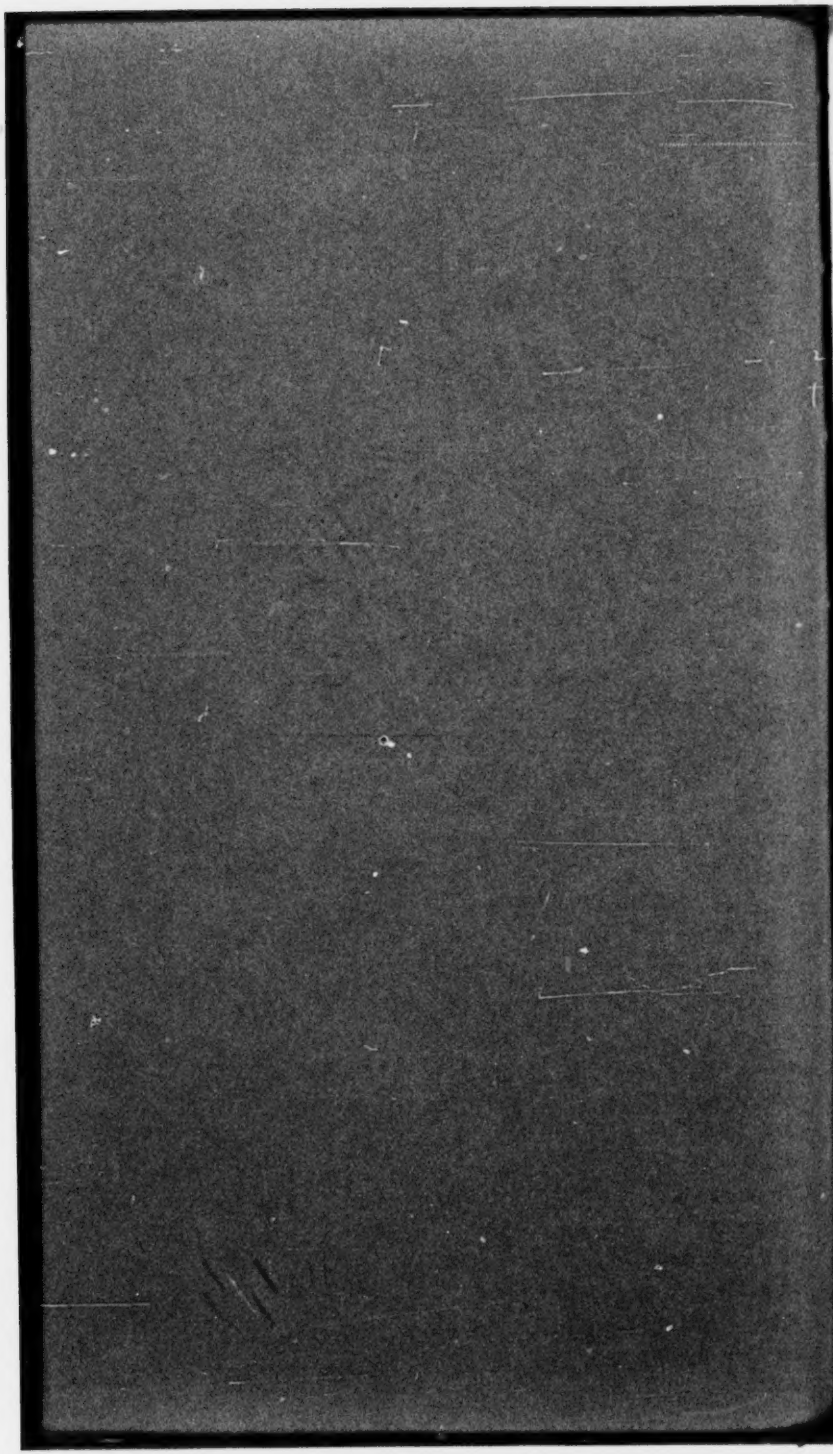
McMillan, Trustee
et al
Respondents

No. 368 Misc.

PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

HENRY A. ANDERSON

COUNSEL FOR PETITIONERS



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

FLORENCE McMILLAN GOODMAN, and FRANCES BRODSKY, Petitioners v. ED LEIGH McMILLAN, et al, as Trustees, Respondents	No. 368 Misc.

PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA:

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States of America:

Petitioners respectfully pray the Supreme Court of the United States to set aside the order of the Court issued on April 6, 1953, which denied to petitioners a writ of certiorari to the Supreme Court of Alabama in the above-styled cause, and respectfully pray the Court to grant to petitioners a rehearing of said petition for said writ of certiorari, and for grounds respectfully set out and assign the following:

1. The undersigned was admitted to practice before the Honorable Supreme Court of the United States on April 6, 1953. On the same day the Supreme Court denied the petition for writ of certiorari to the Supreme Court of Alabama, which had previously been filed pro se. Since being admitted, the undersigned has become more familiar with the rules of the Court and respectfully prays for a rehearing and opportunity to more fully and correctly present to the court the constitutional questions and rights

which petitioners assert have been denied them by the decision of the Supreme Court of Alabama.

2. Attorney for petitioners is aware that some of the rules of the Court have not been complied with and surmises that the petition for the writ was denied because the filing did not comply with the requirements of paragraph 2 of Rule 38, or other rules of this Honorable Court, and prays for rehearing and opportunity to comply with said rules of the Court and to more adequately present tothe Court the asserted violations of petitioners' Constitutional rights.

3. Since petitioners' attorney, as well as the Court, is sworn to support the Constitution of the United States against infractions from whatever source, and since petitioners do assert that their Constitutional rights have been denied them by the Supreme Court of Alabama, petitioners pray for opportunity to correct technical mistakes and to seek equity by application of those great and protective declarations laid down by the Honorable Supreme Court of the United States in the recent case, Fred Y. Oyama, et al, v. State of California, 332 U.S. 633-689; 92 L. Ed. 249, in which the Court declared, 'In approaching cases such as this one, in which federal Constitutional rights are asserted, it is incumbent on us to inquire not merely whether those rights have been denied in express terms, but also whether they have been denied in substance and effect. We must review independently both the legal issues and those factual matters with which they are commingled."

4. We respectfully pray that, under equity rules in general, and under the declarations of the said California case, errors and technicalities made by petitioners or by their attorney may not prevail

against the meritorious assertions of denials of rights under the federal Constitution, and that the Court, of its own motion with whatever assistance attorney may give, may inquire whether petitioners ' Constitutional rights have been denied in express terms or in substance and effect, in order that equity and justice, under the highest law of the land may be secured and protected.

5. The Constitutional questions involved in this case were raised in the Supreme Court of Alabama. The Justices of the Supreme Court of Alabama, from long experience, are well acquainted with the Constitution of the United States and the Constitution of Alabama. It has been their custom and duty throughout the years to make independent search and inquiries to discover whether Constitutional rights were being denied by them or upheld by them in matters which came before them for adjudication.

The denial of vested rights being a violation of both Constitutions, in all briefs presented to the Supreme Court of Alabama in the instant case the vested rights of complainants under the irrevocable trust and under the federal judgment rendered on October 12, 1940, were, over and over, presented to them. After the vested rights of complainants were thus presented to the Supreme Court of Alabama, complainants, in their brief on petition for rehearing, while avoiding offense or threats to appeal if opinion was rendered adverse to them, positively presented to them that Constitutional questions were before them for decision in the language, "There is therefore a federal question involved in this cause".

Being vital to the rights of petitioners in the Supreme Court of the United States, on rehearing the record would be supplemented in order to include the above facts and in order to include in

the assignment of errors heretofore sent up the fact that said Constitutional vested rights were presented to the Supreme Court of Alabama and were denied by them.

We thus pray for a rehearing believing that the greatest of all Courts would not want these claims, so important to petitioners, denied on technical grounds while in violation of the federal Constitution.

6. Only one copy of the petition for writ of certiorari and one copy of the brief and argument was filed in this in forma pauperis proceeding which probably did not conform with the convenience of the Court, since it did not give opportunity for the Court to review the law and facts individually. This omission, petitioners and their attorney pray for the privilege of correcting on a rehearing in order that the Court may be convenienced in studying the cause.

7. Since filing in the Supreme Court of the United States the petition for writ of certiorari and brief, petitioners find that, by mistake, the errors relative to denial of due process of law under the Fourteenth Amendment were omitted from the assignments of error both in the record and in brief filed, and in the interests of the merits, petitioners pray for opportunity to remedy this omission by complying with the rules of the Court. Said errors relative to denial of due process of law were set out but not in the assignment of errors.

8. After the complete record of the proceedings in the trial court and in the Supreme Court of Alabama was prepared and filed in the Supreme Court of the United States, it was discovered by going to Montgomery that no copies of the proceedings in the Supreme Court of Alabama had been made for use of the attorneys of record. Said copies will be made and given to attorneys on rehearing, and we pray to be allowed on rehearing to comply with the requirements of paragraph 1 of Rule 12 as amended.

9. Petitioners pray for a rehearing by the Supreme Court in order that the rules of the Court relative to the content and arrangement of the pleadings filed may be more fully complied with in aid of an adjudication on the merits.

10. So far as the office records show, attorney for respondents, who was served with copies of the papers originally filed, has not accepted service, except by registered mail return card sent to the office of attorney for petitioners, and attorney for respondents has filed no brief in the cause, and respondents apparently would not be prejudiced by the Court's granting a rehearing in the cause.

11. Petitioners' attorney avers that petitioners have a bona fide and meritorious cause with substantial grounds which show that the decree of the Supreme Court of Alabama transgressed the due process of law clause of the Fourteenth Amendment of the federal Constitution and which violates the vested Constitutional rights of petitioners, and that, in equity, said violation should be corrected by this Honorable Supreme Court. Attorney for petitioners humbly prays the Court that he be allowed by rehearing to perform his duty to his clients, and to the Court, in this suit for substantive rights under the Constitution of the United States which he has sworn to support.

Respectfully submitted:

Henry L. Anderton
Atty. for Petitioners

I, Henry L. Anderton, attorney of record for petitioners herein, certify that this petition for

rehearing is presented to the Court in good faith and not for delay and is restricted to the grounds specified in paragraph 2 of Rule 33 as amended and is true to the best of my knowledge, information and belief.

Henry L. Anderton

Henry L. Anderton.

Subscribed and sworn to before me on this, the 23 day of April, 1953. My commission expires on the 24 day of Nov, 1957.

Notary Public

I, Henry L. Anderton, do hereby aver that a copy of the above petition for rehearing in this cause was served upon Mr. Hugh Caffey, attorney for respondent, by sending to him, in his office in Brewton, Alabama, a true copy of the same by registered mail with request of return card on the 23 day of April, 1953.

Henry L. Anderton

Atty. for Petitioners.

FILED
MAY 11 1953
HAROLD B. WILEY, Clerk

IN THE SUPREME COURT OF THE

UNITED STATES

October term, 1952

Goodman, et al, Petitioners	)	
v.	)	No. 144 Misc.
McMillan, Trustee et al, Respondents	)	

AFFIDAVIT

BY

HENRY L. ANDERTON

STATE OF ALABAMA)
JEFFERSON COUNTY)

Attorney for petitioners prays the Honorable Supreme Court to consider this additional affidavit relative to the inability of those interested in this cause to pay or to secure the costs of printing the record and pleadings as required by the rules of the Court.

In the affidavits of the two petitioners, Florence McMillan Goodman and Frances Brodsky, set out in paragraphs 10, 11, 12 and 13 in their forma pauperis affidavit, both petitioners averred under oath that neither they nor anyone else interested in the cause were financially able to pay for the printing as required by the rules of Court.

While those affidavits applied to all interested parties incouding their attorney, affiant herein deems it advisable to state to the Court more definitely that he lost heavily in the depression and that he is not financially able to pay said costs for printing or to secure the same. Affiant's income at present is sufficient only for the support of his family and himself.

However, affiant avers thathe does own his home in Birmingham and, while the rules of the Court do not require it, he is willing to mortgage his unincumbered home to the United States Government to secure said costs of printing in order to obtain opportunity to present fully and adequately to the Supreme Court the merits of his clients' cause.

Clients' cause is bona fide, not frivolous or filed for delay, but seriously involves clients' Constitutional rights to due process of law and equal protection of the laws under the 14th Amendment to the Federal Constitution, which were denied them by the decree of the lower Court. The one copy of the application for the writ and of the record heretofore filed does not, we believe, give to the Court ample opportunity to decide themerits of the cause.

As stated in other pleadings the large record filed herein can well be diminished about one half which was attempted before it was filed in this Honorable Court but was thwarted by the making of demands unattainable, as is shown by the letter attached hereto as Exhibit A.

Unfortunately affiant does not know the grounds for the denial of the writ of certiorari and is striving as best he can to aid the Court and to serve his clients as set forth in the motion for rehearing heretofore filed. But he assumes this Honorable Court would naturally hesitate to place a burden of costs upon the federal government and is therefore offering to make a great sacrifice and bear these costs on the strength of his convictions that his clients' rights are protected by the Constitution of the United States and that if given the opportunity to properly present these rights to this Honorable Court of last resort, thoser rights will be adjudicated according to the law and facts involved.

This is a pledge of sincerity as a counsellor of the Supreme Court of the United States.

Respectfully Submitted,

H. L. Anderton

STATE OF ALABAMA)
JEFFERSON COUNTY)

I, H. L. Anderton, do aver that I am fully informed of the matters and things set out in the above affidavit and that they are true to the best of my knowledge, information and belief.

H. L. Anderton

Subscribed and sworn to before me on this, the 9th day of May, 1953. My commission expires on the ___ day of ___, 19__.

Notary Public, Jefferson County, Alabama.
My commission expires Sept. 12, 1956.
Bonded by The Employers Liability Assurance Corporation

Notary Public

Copy served on Hugh Caffey, attorney for respondents by registered mail on May 9, 1953

McMILLAN, CAFFEY & McMILLAN
ATTORNEYS AT LAW
BREWTON, ALA.

Exhibit A January 8, 1953

Mr. H. L. Anderton
Attorney at Law
Birmingham, Alabama.

Dear Mr. Anderton:

I have your letter of yesterday in regard to appeal of the Goodman case to the United States Supreme Court. I called the Clerk of the Circuit Court and he advises that although he sent you statement covering court costs already incurred, this has not been remitted and until such time as these costs are paid I do not feel called upon to make any decision as to the abridgment of the record on further appeal.

Mr. McMillan is at present out of town and when I am advised that the lower court costs have been paid I will take up with him and abide by his decision in the matter.

Yours very truly,

Hugh M. Caffey

HMC/mc

Hugh M. Caffey

Copy
Original filed with Clerk

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SUPREME COURT OF THE UNITED STATES

RECEIVED
JUN 9 - 1953
OFFICE OF THE CLERK
SUPREME COURT, U.S.

October Term, 1952

odman, et al Petitioners	(
v.	No. 368 Misc.
cMillan, as Trustee t al Respondents	

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etition and prayer to the Supreme Court of he United States to set aside the Court's rder entered on May 18, 1953, denying rehear- ng of petition for writ of certiorari in the bove-styled cause, and to grant the same, orrections herein considered.

****

Henry L. Anderton

Counsel for Petitioners

COPY BOUND CLOSE IN CENTER

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1952

Florence McMillan Goodman and Frances Brodsky Petitioners	)	
v.	)	No. 368 Misc.
Ed Leigh McMillan, et. al as Trustees Respondents	)	

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States of America:

Petitioners respectfully pray the Supreme Court of the United States to set aside, recall and reconsider the order entered on May 18, 1953, denying a rehearing of the petition for writ of certiorari in the above-styled cause, and respectfully pray the Court to grant a rehearing, and for grounds set down and assign the following:

1. Petitioners apologize to this Honorable Supreme Court of the United States for not complying with the rules of the Court in this cause and humbly pray the Court to allow the Separate Statement attached hereto and marked Exhibit A to be filed and considered by the Court as an amendment to the petition for Writ of Certiorari heretofore filed. This Separate Statement complies with paragraph 1 of Rule 12 of the Rules of this Honorable Court and gives the nature of the case and the basis upon which it is contended the Supreme Court has jurisdiction to review the decree which was rendered below adverse to

petitioners. Not realizing this Separate Statement was required in other than appeal cases it was inadvertantly left out.

2. Petitioners aver to the Court that the record sent up from the Supreme Court of Alabama contains the 22 correct assignments of error applicable to this cause. The copy made for petitioners and their attorney was sent to the Clerk of this Honorable Court and neither petitioners nor their attorney has thereafter had available to them a copy of the record. Thus by mistake the wrong Assignment of Errors was placed in the petition for writ of certiorari or brief which mistaken assignments of error could not have helped this Honorable Supreme Court to decide this cause.

Petitioners humbly pray the Court to allow the correct Assignment of Errors, as it appears in the record, to be placed in the petition for the writ of certiorari as an amendment thereto in order to comply with the Rules of the Court and to aid the Court, a copy thereof being attached hereto and marked Exhibit B.

3. Petitioners respectfully show to this Honorable Supreme Court that so far this cause has proceeded ex parte according to the records of the Court since respondents have not filed an answer or other pleadings and have not acknowledged to this Court receipt of any of the pleadings filed herein by petitioners, correct copies of all of which have been forwarded to respondents' attorney within the time and in the manner required by the Rules of the Court.

For this reason there would surely be no injustice done anyone to allow reconsideration and to allow petitioners to present to the Court the merits and basis of their cause, which they aver to be bona fide and meritorious.

4. Petitioners and their attorney respectfully aver that petitioners have substantial rights involved in this cause which are vested under the Constitution of the United States; that any errors that have been made in the filing of this cause will be corrected to accord with the Rules of this Honorable Court; that it would be a great injustice not to allow petitioners to present to the Court fully the merits of their cause as briefly presented in the Separate Statement filed herewith; that any technical mistakes made by the attorney in filing the petition for the writ of certiorari should not, in equtiy, be charged against the rights of petitioners.

5. To get this opportunity, if it is permissible, the undersigned attorney for petitioners will execute a mortgage to secure the government against loss for the printing of the records and other papers in this cause.

6. Though humble and of the multitudinous common citizenry we put our faith and confidence in what we read "Equal Justice Under Law" chosen as the great and controling motto of the greatest of all Courts humbly pray under the Constitution not to be cast out of Court, but to be given an opportunity to demonstrate ours to be a just and righteous cause protected under law.

Henry L. Anderson
Attorney for Petitioners.

I, Henry L. Anderton, aver that the matters and things set out above are true to the best of my knowledge, information and belief.

Henry L. Anderton
Henry L. Anderton.

Subscribed and sworn to before me on this the 8th day of June, 1953. My Commission expires on the 2nd day of May, 1957.

Chas. M. Hewitt
Notary Public.

A copy of the above was served upon Mr. Hugh Caffey, Attorney for respondents, by United States mail, at his office in Brewton, Alabama, postage prepaid, on the 8th day of June, 1953.

Henry L. Anderton
Henry L. Anderton.

SEPARATE STATEMENT REQUIRED BY RULE 12, PARAGRAPH 1 AS AMENDED IN OCTOBER TERM 1941

EXHIBIT A

The basis upon which it is contended that the United States Supreme Court has jurisdiction to review the decree of the Supreme Court of Alabama in this cause and the nature of the cause are as follows:

This action was brought in the equity division of the Circuit Court of Escambia County, Alabama, by Florence McMillan Goodman and Frances Brodsky, complainants, against Ed Leigh McMillan et al, as trustees, respondents, on March 16, 1945, and was twice amended. (R. 1, 38, 39)

D.W. McMillan, a resident of Escambia County, Alabama, married complainant, Florence McMillan Goodman, on April 4, 1928, and on March 29, 1929 executed a trust for between one and two millions of personal property which was declared by the trustor, and by the terms of the trust, to be "immediately and irrevocably vested" in the trustor's cousin, Ed Leigh McMillan, as trustee, "free from all dominion and control" by the trustor, in which complainants among others were made beneficiaries. (R. 6-12).

After enumerating all the properties in the trust the trustor said, "The title to all the above mentioned properties and assets is hereby immediately and irrevocably vested in the said Ed Leigh McMillan, as trustee, free from all dominion and control by me". In the sixth paragraph of the trust the trustor emphasized his intent and meaning in these words, "it being my intent and meaning that the title to all of the above mentioned and described properties and assets shall vest and

is hereby immediately and irrevocably vested in the said Ed Leigh McMillan as trustee ---". (R. 6-12). The provisions made by the trustor for the complainants herein are as follows: (a) "There shall be paid to my widow, Florence McMillan, the sum of one thousand ($1,000.00) per month so long as she shall live and remain my widow".

(d) In the event that either of my cousins Ed. Leigh McMillan or Malcom McMillan, or any of the family or lineal descendants of either; or either of my stepdaughters, Annette Woods or Frances Brodsky, should during the continuance of this trust, be in want or needy circumstances, — then in any of said events my trustee or trustees shall use and devote so much of said income and profits not otherwise divested as he or they may deem necessary or proper for the support, comfort and wellbeing of those or any of those so in want or in needy circumstances".

The trust here involved, being irrevocable with vested rights in the trustee for the use of the beneficiaries, could not, under law, be revoked, amended or explained away by subsequent writings, expressions of intention or acts of the trustor or trustee, derogatory to the trust provisions for the beneficiaries, without their consent, which consent was never given, and there was no specific right of revocation reserved in the trust. Among the cases, which are numerous, sustaining these principles, are the following:

Andrews et. al. v. Hobson's Admr. et. al.,
23 Ala. 219
Whiteside v. Venty, 269 Fed. 227.
Roberts v. Taylor, 300 Fed. 257.
Cazallis et. al. v. Ingraham et. al, 110 A. 359
Scott on Trusts, Vol. 3 par. 332.
38 A.L. R. 941.
Tierney v. Fitspatrick, 195 N.Y. 433; 88 N.E.

Hurt v. Gilmor, 59 App. D.C. 282; 40 F. (2d) 794
Richardson v. Adams, 171 Mass. 447; 50 N.E. 941.
Nertz v. Guaranty Trust Co., 247 N.Y. 137;
159 N.E. 888.
Allen v. Safe Deposit & Trust Co., 177 Md. 26;
7 A. 2nd 180.
Skillin v. Skillin, 133 Me. 347; 177 A. 706.

In addition to the trust here involved being irrevocable the rights of the beneficiaries therein are vested and were immediately vested at the time of the execution of the trust. Being vested rights in the trustee for the use and benefit of the beneficiaries at the time of the execution of the trust these vested rights could not be divested out of the beneficiaries at a later date by any act or acts of the trustor or the trustee. The following citations sustain the fact that the vested rights of complainants cannot be divested or taken from them by any subsequent intentions or acts:

Andrews et. al. v. Hobson's Admir. et. al.
23 Ala. 219.
Muhlor v. Y.Y.R.R. Co., 197 U.S. 544.
Sections 22, 95 and 6 of Constitution of Alabama 1901.
Amendment 14 of Federal Constitution.
State ex. rel. Highsmith v. Brown Service Funeral Co., 236 Ala. 249; 182 So. 18.
State v. Bush, 12 Ala. App. 309; 68 So. 492
Adams v. Green, 100 Ala. 218; 14 So. 54.
Skillin v. Skillin, 133 Me. 347; 177 A. 706.
2 Bouvier Law Dictionary, Ed. of 1858, p. 625.
Coosa River Steamboat v. Barkley & Henderson,
30 Ala. 120, 126.
Oyama v. State of California, 68 Sup. Ct. 269;
322 U.S.; 92 L. Ed. 249.

On October 12, 1940, more than ten years before any decision in this cause was rendered, the District Court of the United States for the Southern Division of the Northern District of Alabama

rendered a decision between Florence McMillan and D.W. McMillan which decided the main issue in this cause so far as the provision for the widow, Florence McMillan, is concerned, in these words:

"D.W. McMillan and Florence McMillan were reconciled to each other and that they lived together as man and wife, and that said settlement under the laws of the State of Alabama constituted a valid marriage and vested in Florence McMillan property and rights to property as such wife."
(R. 365-367)

At the death of D.W. McMillan his trustee became his privy. This federal decision on the main question here involved was never attacked by motion or otherwise and has stood unmodified for more than thirteen years and is res adjudicata of the question so decided.

So. Pac. Ry. Co. v. United States, 168 U.S. 1; 18 S. Ct. 18, 27; 42 L.Ed. 355, at page 376.
Griffith v. Benzinges, 144 Md. 575; 125 A. 512, 520.
50 C.J.S. 535.
Stoll v. Grottlieb, 59 S. Ct. 134.
Clark v. Matthewson, 12 Peters (U.S.) 164
Fitspatrick v. Domingo, 14 Fed. 216.
Walker v. St. Louis & San Francisco R.R. Co., 108 So. 388.
Pettus v. McClannahan, 52 Ala. 55.
Doremus v. Root, 23 Wash. 710; 63 Pac. 572.
Wetmore v. Karrick, 205 U.S. 141; 51 L.Ed. 745.
Supreme Court Rule 38, Sec. 5 (b).

The following cases substantiate the claim of vested rights under the federal decree of October 12, 1940:

Pearsall v. Great No. Ry. Co., 161 U.S. 646.
Merchants' Bank v. Ballou, 98 Va. 112; 32 S.E. 481

Floyd v. Wilson, 171 Ala. 139.
Barnitz v. Beverly, 163 U.S. 118.
Pritchard v. Norton, 106 U.S. 124.
Simon v. So. Ry. Co., 236 U.S. 115.
Moore v. Packer, 174 N.C. 665; 94 S.E. 449.
Gray v. Stuart, 33 Gratt. (va.) 351.
Schmerlzer v. Central Fur. Co., 252 Mo. 12; 158 N.W. 353.
Philbrook v. Neurman, 148 Cal. 172; 82 Pac. 772.
Central of Ga. Ry. Co. v. Gross
Coe v. Armour Fer. Works, 237 U.S. 413.
Ballou, 98 Va. 112; 32 S.E. 481.
Supreme Court Rule 38 Sec. 5 (b).

That said federal decree of October 12, 1940, which decided that D.W. McMillan and Florence McMillan were reconciled after divorce and lived together as man and wife thereafter in the marriage relation which vested in the wife vested rights to property as such wife, is supported by Mr. Justice Harlan in Southern Pacific Railway Co. v. United States, 168 U.S. 1; 18 S. Ct. 18, 27; 42 L.Ed. 355 at page 376, as follows:

> "The general principle announced in numerous cases is that a right, question, or fact distinctly put in issue, and directly determined by a court of competent jurisdiction in a subsequent suit by the same parties or their privies, and, even if the second suit is for a different cause of action, the right, question, or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified."

The state court has no power to again inquire into this question so decided by the federal court:

Stoll v. Gottlieb, Ill., 59 S. Ct. 134;
305 U.S. 165; 33 L.Ed. 104,
rehearing denied, 59 S. Ct. 250;
305 U.S. 675; 83 L.Ed. 437.

A judgment is a property right and becomes vested when the same becomes a final judgment and cannot thereafter be destroyed or diminished by a retroactive statute, decision or law, all rights being vested when their enjoyment, present or prospective, have become the property of a particular person as a present interest.

Merchants' Bank v. Ballou, 98 Va. 112;
32 SE 481
Lane's Appeal, 57 Conn 182; 17 Atl 926
Pearsal v. Great No. Ry. Co. 161 U.S. 646

Any decision, law or statute which in its operation amounts to a denial or obstruction of a vested right, though professing to act only on the remedy, unconstitutionally impairs rights granted by the Federal Constitution, and a legislature is powerless to enact any law which, in its operation, tends to destroy or lessen any defense to a cause of action.

Floyd v. Wilson, 171 Ala. 139
Armstrong v. Sellers, 182 Ala. 582
Barnitz v. Beverly, 163 U.S. 118
Martin v. Martin, 35 Ala. 560
Pritchard v. Norton, 106 U.S. 124
Sec. 95 Ala. Constitution of 1901
Simon v. So. Ry. Co., 236 U.S. 115

After final judgment, the parties are not presumed to be in court; therefore, any motion or order made in relation to the cause, after final judgment, that materially affects the judgment of the court, and without notice to the party to be affected, will be erroneous,

and under the due process clause of the Fourteenth Amendment is not to be tolerated upon fundamental principles which guarantee to the person to be affected a day in court and a hearing upon such questions as to whether the judgment is void or voidable, or any other defenses thereto possessed by him.

Wetmore v. Karrick, 205 U.S. 141
Coe v. Armour, etc. 237 U.S. 423
Stringer v. Echols, 46 Ala. 61
Windsor v. McVeigh, 93 U.S. 27[illegible]

The provision made for the wife, Florence McMillan, in the trust, (R. 6-12), is in law $1,000.00 per month so long as she shall live for two fundamental reasons. First, the words to my widow so long as she shall remain my widow, depended upon by respondents, is definitely in restraint of marriage, contrary to public policy and to the common weal and good order of society. To the dependent wife it would be a powerful restraint to a future marriage to say: "If my wife will not marry again I will give her $1,000.00 per month so long as she shall live, but, if she does marry again I will give her nothing out of my millions". No restraint could be stronger. White v. Equitable Nuptial Benefit Union, 76 Ala. 251, sustains the above and concludes, "Neither is it necessary that there shall be positive prohibition. If the condition is of such nature and rigidity in its requirements as to operate as a probable prohibition, it is void." It is the policy of the law to encourage marriage and family life and not to induce celibacy or adultery.

Second, in addition to being powerfully in restraint of marriage the expression "and remain my widow" is in strict violation of the accepted "in terrorem" doctrine, and is void. If the gift is personal property, as here, and after the restraint

there is no express and immediate gift over to a definite person, in the event of marriage, and to take effect at the time of marriage, the restraint is to put the beneficiary in fear to marry and is legally void. The law holds that a gift to ultimate heirs or beneficiaries is not sufficient. There must be a gift over immediately to remove the threat from the ban of the law.

Parsons v. Winslow, 6 Mass. 169; 122 A.L.R. VIII b; 122 A.L.R. b page 55 and note 4; 35 Amer. Jr. Par. 266; In re Pashak (1923 Alberta) 1 West Melk. Rep (1923) 1 D.L.R. 1130.

Thus viewed in the light of the law, without a burden of sentimentality, the gift to the wife at the death of the trustor husband is $1,000. per month so long as she shall live.

Four years after the execution of the irrevocable trust with vested rights the trustor obtained a divorce from his wife, over her protest, on the ground of unfaithfulness. This voluntary divorce could not under the law void her vested rights. The trustor had made no reservation in the trust for revocation in case of unchastity or divorce. Besides, neither unchastity nor divorce is a legal ground for revoking vested rights in an irrevocable trust. Courts of equity are charged with interpreting and enforcing Constitutional, common and statutory laws and not the morals of the commandments. Irrevocable and vested rights cannot be destroyed for committing theft, profanity, adultery or any other of the ten commandments. Confusion and misery would reign under such a policy. The trustor could not, under the law, be justified in divorcing his dependent wife and thereby making her not his wife at his death to destroy her vested rights in the trust. After he obtained the divorce the trustor went back to his wife either in reconciliation or in adultery, the very grounds

for which he divorced her. If there was not a reconciliation as she claimed, he lived with her in adultery thus condoning adultery on her part.
(R. 199; 107-225).

Out of many supporting cases we refer to the following:

"That the wife, subsequent to execution of the agreement for separate maintenance, has committed adultery, in consequence of which the husband has secured a divorce was held not to be defense to an action by her on the agreement."
Hann v. De Crest (1919) 178 N.Y. Supp. 414.

"A divorce obtained by the husband on the ground of the wife's adultery was held not to terminate the separation agreement."

Nuhr's Estate (1915) 59 Pa Super Ct. 393

" -- When property is conveyed or transferred to a wife by her husband even at her solicitations, a court of equity will not, as a general rule in case of the subsequent estrangement of the parties, though such estrangement is caused by the fault of the wife, set aside the conveyance at the instance of the husband, and even though for such fault the husband secures a divorce."

13 Ruling Case Law (Husband and Wife)
par 400

On May 28, 1938, twenty-one months and twenty-four days after the death of the trustor Florence McMillan married again. This marriage could not in any way revoke the provision made for her and vested in her when the trust was made. The cases hold that when a trust is made for the separate use of a married woman and her husband dies or is divorced

from her, and she marries again, the provision in the trust for her separate use remains effective. Thus the provision of $1,000.00 per month is vested for her and continues regardless of future marriage.

> "Where a trust was created for the separate use of a married woman and her husband died or was divorced from her, and she married again, the provision for the separate use again became effective."
>
> Tullett v. Armstrong, 4 Myl. & Cr. 377 (1840);
> Phillips v. Grayson, 23 Ark. 769 (1861)
> Robert v. West, 15 Ga. 122 (1854);
> Hildreth v. Eliot, 8 Pick 293 (Mass., 1829);
> Hobbins v. Smith, 72 Ohio St. 1, 73 N.E. 1051 (1905)

> "Marriage settlement where wife was paid income from and after husband's death if she survives him, 'during her life or until she shall marry again' and she obtained dissolution of marriage and remarried before he died, the income was payable to her despite her remarriage and this rule applies whether the dissolution was upon husband's or wife's petition." (95 A.L.R. P. 1470)

The trustee's arbitary refusal to pay to complainants anything under the trust can be understood by the fact that while the reconciliation was in progress he wrote a letter, dated March 30, 1936, to the trustor introduced by respondents as their Exhibit 57, (R. 378), in which he said to him: "I would like to reiterate what I have said—that you have absolutely nothing to do with McCormick or with your former wife.

Do not communicate with either of them. If you want to preserve, as evidence, communications received from them, send them to me for safekeeping." The trustee gave to each of the other beneficiaries, including himself, the gifts made to them in the trust, (R. 86); he did not permit any of the other trustees to act but acted as sole trustee, (R, 390, 330, 282); he never made one annual report to any court after the death of the trustor in 1936 as was sepcifically directed and required by the trustor in the trust, (R. 12, 304); he did not place the money realized from his sale of Florida property in the trust fund as required of him by the trustor, (R. 287-289). And it was the trustee who dictated to Miss Tiffin, his secretary, (R. 105), an alleged amendment in an illegal attempt to have the irrevocable trust revoked so far as the interests of the complainanats were concerned. (R. 309-310). However, the trustee admitted on corss-examination that the alleged amendment did not revoke nor alter the irrevocable trust and that an irrevocable trust is one that cannot be revoked. (R. 289). The trustor himself apparently knew that the trust, dictated by the trustee for him to sign, could not destroy the provision he had made for his wife in the trust. Before he signed he specified that if he was without power to make the amendment the original instrument "with all its legal terms and provisions, shall remain in full force and effect". The alleged amendment was objected to by complainants. (R. 103).

Respondents interduced in evidence the last will and testament of D. W. McMillan dated November 12, 1930. (R. Bottom 314--top 315), and the codicil thereto dated January 20, 1934, (R. 316), long after the divorce of the previous year. In the will he stated that it was made of his own accord and that "by that instrument (trust agreement) I divested

myself of the property therein described and made provision for my wife, Florence McMillan, which I then thought and yet believe to be ample for her." In the codicil, made after the divorce had been obtained, he revoked paragraph four of the will relative to the bequest to his wife of the automobile and interests in the household furnishings but did not alter or revoke the $1,000.00 provision for his wife saying "I hereby ratify and confirm my last will and testament in all other respects". (Underscoring supplied). This is definite and it would be unjust to interpret this plain language otherwise than that, regardless of the divorce, the trustor intended for his wife to have the provision made for her in the trust. The trustee in fact admitted that the trust was executed while the trustor was in sound mind and contained exactly what the trustor intended. (R. 278-279).

STATUTORY AND CONSTITUTIONAL PROVISIONS:

The statutory provisions believed to sustain the jurisdiction of the Honorable Supreme Court of the United States relative to the irrevocable and vested contractual rights of complainants and their vested rights under the Federal Constitution and under the Federal decision of October 12, 1940, as above set forth, are; (a), Section 95 of the Constitution of Alabama of 1901 which provides, "There can be no law of the state impairing the obligation of contracts by destroying or impairing the remedy for their enforcement;" (Code of Alabama, Titles 1-6, page 133).

Section 22 of the Constitution of Alabama of 1901 which provides: "That no ex post facto law, impairing the obligations of contracts----shall be past by the legislature;"

"The obligation of a contract which cannot be impaired is its binding force on the party

making it. The Constitution forbids the least as well as the greatest impairment of its obligation."

Edwards v. Williamson, 70 Ala. 145;
Adams v. Green, 100 Ala. 218, 14 So. 54;
Osborn v. Johnson Wall Paper Co., 99 Ala. 13 So. 776.

(b) Section 1 of the Fourteenth Amendment to the Constitution of the United States provides that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

(c)- The date of the judgment of the Supreme Court of Alabama sought to be reviewed is August 27, 1952, and in due time thereafter appellants filed an application for a rehearing which was overruled on November 6, 1952. (R. 442). Within ninety days therefrom and on February 3, 1953, petition for Writ of Certiorari, affidavit and brief were duly filed in the Supreme Court of the United States.

STAGE OF PROCEEDINGS IN TRIAL COURT AND APPELLATE COURT WHERE QUESTIONS TO BE REVIEWED WERE RAISED AND WAY PASSED UPON BY THE COURT.

The complete evidence taken in this case in the court of first instance was before a commissioner, and no witness was seen, and no evidence was heard orally, by the Court:

"Testimony not having been taken orally in open court, no presumptions are indulged as to the finding of fact on which the decree is based."

Blair v. Jones, 201 Ala. 294; 78 So. 69.

The chief question of the irrevocable trust with vested rights was plainly presented to the trial court in Exhibit A to the original bill. Thereby the full wording of the trust was placed before the court for his consideration and so impressed in evidence that the trustee himself admitted that the irrevocable trust could not be revoked, (R. 289) and that it was exactly what the trustor intended. (R. 278-279). The main questions for review, namely, that the trust is irrevocable and that vested rights exist were throughout urged and insisted upon. The case of Andrews et al v. Hobson's Adm'r et al, 23 Ala. 219, which holds that the title was irrevocable and vested in Hobson and could not afterwards be divested was insisted upon. Scores of other cases so holding were presented.

By amendment the decision of the District Court of the United States for the Southern Division of the Northern District of Alabama, dated October 12, 1940, which is res adjudicata of the question of the widowhood of Florence McMillan at the time of the death of the trustor (R. 365-367) was urged upon the court in brief and argument.

Nevertheless the trial Court ruled out on demurrers, and failed to consider, this Federal decree unattacked for more than ten years, and ruled, in the face of the irrevocable trust with vested rights, that Florence McMillan Goodman have nothing on account of divorce obtained by the trustor more than four years after the trust vested.

The Court decreed nothing to Frances Brodsky, sick with tuberculosis and a collapsed lung, with bills piling up for necessary treatments, on the assumption, without evidence, that she was not "in want or needy circumstances". (R. 416-420). (R. 391-392). (R. 295-296). The trustee

violated the terms of the trust which said "my trustee shall" furnish funds for such support, comfort and wellbeing. The trial court in his said decree allowed her nothing.

These rulings by the trial Court, we respectfully submit, sweeping clean every vested right in the irrevocable trust, refusing to consider the unmodified Federal decree of October 24, 1940, as res adjudicata of the fact that Florence McMillan Goodman was the widow of the trustor at his death, and placing his own decree superior to said Federal decree, are of a nature to bring the case within the revisory jurisdiction of this Honorable Supreme Court of the United States.

Upon appeal from the trial court 22 assignments of error made in the trial court were urged with the appellate court and are in the record sent up to this Honorable Supreme Court. (R. 428-430). Assignment 16 pointed out that the trial court erred by not decreeing that, by the terms of the trust, the properties provided in (a) and (d) of the trust were <u>immediately</u> <u>and</u> <u>irrevocable</u> <u>vested</u> in the trustee for the benefit of the wife and the daughterinlaw, Frances Brodsky, without further dominion or control by the trustor; that the divorce by the trustor, over the wife's protest, could not breach the irrevocable trust nor divest the wife of her status as widow or beneficiary at trustor's death. with errors 1, 2, 4, 5, 7 and 11 emphasizing the same error; errors 3 and 14 pointed out the trial court's error in excluding the unmodified decree of the United States District Court for the Southern Division of the Northern District of Alabama, which sustained the reconciliation between D. W. McMillan and Florence McMillan and her rights, as widow, to properties of D. W. McMillan,

deceased. By briefs and argument these vested rights were urged upon the appellate court, it was urged that a Constitutional question was involved. That the Constitutional question of vested rights was before the Court is admitted in the sixth paragraph of the decree wherein it is asserted by the Court that the primary inquiry is, does an estate to his widow vest in her.

The decree of the Appellate Court veered away from the Constitutional question of vested rights and the irrevocability of the trust to the theory that the wife's alleged unfaithful conduct made her not the widow and destroyed all her vested rights in the trust. The Court based its refusal of these rights upon a moral precept instead of upon the law.

The Appellate Court erred, in paragraph 7 of the decree, by saying the "intention of the settlor is the law of the trust" and then applying an intention for divorce which arose four years after the trust was executed. The law of the trust is the intention of the trustor "at the time of the creation of the trust." The trustor had no intention to obtain a divorce at the time he executed the trust.

> "The terms of the trust are determined by the intention of the settlor at the time of the creation of the trust, and not by his subsequent intention. Directions given by the settlor subsequent to the creation of the trust are not admissible to vary its terms, unless he has reserved power to modify or revoke the trust".

Richardson v. Adams, 171 Mass. 447, 50 N. E. 941
Mertz v. Guaranty Trust Co., 247 N.Y. 137; 159 N.E. 888; 57 A.L.R.1114
Skillin v. Skillin, 347; 177 A. 706.

The appellate court denied the application of the "in terrorem" accepted doctrine, gave petitioner, Frances Brodsky, absolutely nothing despite the preponderance of evidence, and affirmed the decree of the trial court "in all things".

The complainants' motion for rehearing was denied in the words "the same is hereby overruled". (R. 441).

The questions involved are substantial because the decree of the Supreme Court of Alabama violates vested rights in the irrevocable trust and in the modified Federal decree of 1940, all of which is in violation of the "due process of law" and the "equal protection of laws", clauses of the Fourteenth Amendment to the Constitution of the United States and of Section 95 and 22 of the Constitution of Alabama of 1901.

The questions involved are substantial because the rights of the petitioners are vested and a grave injustice has been done the wife who has suffered since the death of the trustor on August 4, 1936. She has suffered all these intervening years, and now owns nothing and has nothing to sustain her. She married since, but her husband is sick with a progressive disease, and unable to furnish her adequate support.

The question is substantial because under her vested rights in the irrevocable trust the sum owing her, with interest, amounts to more than $300,000.00, which is owed by a rich turst and which can pay the debt without being burdened.

The questions are substantial because the amount owing Frances Brodsky have been denied her without reason or evidence. Her tubercular condition demanded help according

to the terms of the trust and were arbitarily denied her.

We respectfully say to this Honorable Supreme Court of the United States that the rulings of the Supreme Court of Alabama are such as to bring the case within the jurisdictional provisions of the Supreme Court of the United States for review. (R. 432-439).

Appended hereto is a copy of the opinion and decree of the trial court, and a copy of the opinion and decree of the Supreme Court of the United States sought to be reviewed.

Henry L. Anderton
Attorney for Petitioners.

STATE OF ALABAMA)
)
JEFFERSON COUNTY)

I, the undersigned, Henry L. Anderton, aver that I have prepared and understand the matters and things set forth in the above statement required by paragraph 1 of Rule 12 of the Rules of this Honorable Supreme Court as amended, and aver that they are true to the best of my knowledge, information and belief.

Henry L. Anderton
Henry L. Anderton.

Subscribed and sworn to before me on this the 9th day of June, 1953. My Commission expires on the 2nd day of May, 1954

Chas. M. Hewitt
Notary Public.

Ex B

ASSIGNMENT OF ERRORS
(pp. 428, 429, 430
of record)

1. The trial court erred by decreeing that Florence McMillan Goodman, Complainant, is not entitled to any relief prayed for in the Bill of Complaint as amended, and that the claim of said Complainant against the trust fund of W.D. McMillan, Deceased, and the Trustee and Co-trustees under the trust agreement be denied.

2. The trial court erred in decreeing that Frances Brodsky is not entitled to any of the relief prayed for in the Bill of Complaint as last amended and that the claim of said Complainant against the trust fund and the Trustee and Co-trustee under the trust agreement be denied.

3. The Court erred in sustaining respondents' demurrers to Paragraph 13 of the Bill of Complaint as last amended thereby, excluding from the evidence the Judgment of Honorable T.A. Murplree, former Judge of the United States District Court for the Southern District of the Northern District of Alabama, rendered October 12, 1940, which federal judgment decreed and sustained the reconciliation between D.W. McMillan and Florence McMillan and sustained and decreed her rights in the properties of D.W. McMillan, Deceased.

4. The Court erred in adjudicating that "It was never the intention of the settlor, D.W. McMillan, under the language of said trust agreement, construed as a whole, to make any provision for the Complainant, Florence McMillan," in view of the evidence and the law involved.

5. The Court erred in adjudication that the obtaining of a decree of divorce by the trustor, himself, over the protest of Complainant, deprived her of all interest in the provision made for her by her husband in the irrevocable trust agreement.

6. The Court erred in adjudging that Complainant, the beneficiary under the irrevocable

trust, was not the widow of D.W. McMillan in contemplation of the law and under the decisions before him and in view of the terms of the trust agreement and the facts and evidence involved, with the result that she has no interest in the funds of the trust and is entitled to no relief.

7. The Court erred in adjudication that under the language of the trust and the facts involved the settlor never intended to make any provision for Complainant, Florence McMillan, his wife.

8. The Court erred in deciding that the Complainant has no interest in the trust agreement when considered with the trustor's will introduced by respondents (T. 314-315) which declared concerning the provision in the trust for her, "which I then thought and yet believe to be ample for her," taken in connection with the codicil thereto (T. 316) introduced by respondents wherein he ratified the statement in the will that the provision in the trust for her was smple, said ratification of the provision for her in the trust having been made January 20, 1934, long after the divorce was obtained by him.

9. The Court erred in that the interpretation placed by the Court upon the language of the provision "to my widow" made by the trustor for his wife in the trust agreement would, by such interpretation, in effect give to her $1000.00 a month if she does not marry and nothing if she does marry, is in violation of the laws against restraint of marriage. Also, the Court is in error because said language "to my widow" refers "to the person and not to her state or condition," and must be given the legal and not the dictionary definition and cannot be interpreted to deprive the wife of the provision made for her by the trustor for life. (Prop. 2, 3, 4).

10. The Court erred in decreeing that said Complainant has no interest in the trust properties because the language "and remain my widow" is seriously in restraint of marriage but is also in violation of the "in terrorem" doctrine since

there is no express and immediate gift over to a definite person to take effect if there is a breach by marriage at the time of marriage, the said language being a mere threat against marriage. (Prop.4).

11. The Court erred by not decreeing to said Complainant from the trust $1000.00 a month from the death of the trustor to date and $1000. a month on "so long as she shall live."

12. The Court erred by decreeing that Frances Brodsky, the trustor's step-daughter, was not under the evidence, "in want and needy circumstances" and shall have nothing under the trust.

13. The Court erred by not decreeing that neither divorce nor divorce and remarriage voids the trust so far as the interests of said Complainant are concerned. (Prop. 5 and 6).

14. The Court erred by decreeing that under the evidence and the U.S. Decree of October 12, 1940, and the law involved, there was no reconciliation between D.W. McMillan and said Complainant.

15. The Court erred in failing to decree that the trustee had no legal right to arbitrarily and upon his own private judgment and opinion, refuse and fail to pay to Complainants the amounts provided for them under the trust without appealing to a proper court for the court's decision before acting contrary to the rights and interests of complainants, thereby damaging them as set forth in the Bill of Complaint as last amended.

16. The Court erred by not decreeing that, by its terms, the trust properties were immediately and irrevocably vested in the trustee for the benefit of named beneficiaries without any further dominion or control over it by the trustor, and that he could not later break the irrevocable trust and thereby deprive Frances Brodsky of her interest under the trust, nor could he later by means of obtaining a divorce from his wife, over her protest and against her wishes, break the trust and thereby divest his wife of her status as widow or bene-

ficiary, thereby after making the irrevocable trust voluntarily breaking it without the consent of the beneficiary, with the result of depriving the wife of the provision made for her by the deceased trustor, since equity requires that done which ought to be done and clean hands for entrance across the threshold of equity.

17. The Court erred by not acting upon and declaring null and void and of no effect the amendments to the trust agreement instead of asserting that he reached his decision "without the aid of the supplemental declaration of the said D.W. McMillan".

18. The Court erred by not ruling upon and excluding respondents' Exhibits 6, 7, 8, 9 (T. 120, 121, 127, 128); 32 (T. 215, 360); 33 (T. 216, 217, 360); 36 (219); 39, 40, 41,42 (T. 232, 367-370); 42-B, 44, 45, 46, 47, 48, 49, 50, 54, 56, 57, 59, 60, 61, 62, 63 (T. 253 to 275).

19. The Court erred by not holding that divorce puts an end to the marital relation but does not relate back to the act of marriage and render that act void; that it is prospective only and recognized the rights that arose out of the marriage; that the divorce herein did not void the trust interests previously given the wife by the trustor

(Prop.5)

20. The Court erred by not decreeing to Complainants substantially the amounts claimed by them in the Bill of Complaint as last amended.

21. The Court erred in decreeing that the Bill of Complaint and amendments thereto in this cause be dismissed out of Court and that respondents recover of complainants their costs for which let execution issue.

22. The Court erred by not recusing himself from the trial of said cause as prayed for by Complainants.

Respectfully submitted,
(s) H.L. ANDERTON,
Attorney for Complainants.

DECREE OF TRIAL COURT

FLORENCE McMILLAN GOODMAN, AND
FRANCES BRODSKY,

COMPLAINANTS,

VS.

ED LEIGH McMILLAN, AS TRUSTEE, et.al.

RESPONDENTS.

IN THE

CIRCUIT COURT

OF

ESCAMBIA COUNTY

ALABAMA

IN EQUITY.

No. 4578

This cause was heretofore submitted for final decree upon motions, pleadings, proof and objections to testimony as noted by the parties and as filed by the Register upon such submission. The Court has given careful consideration to the issues made by the pleadings, the evidence offered in support of said issues and to the oral arguments and written briefs of the respective attorneys for the parties hereto. In reaching its decision on the merits, the Court has considered only such relevant material, competent and legal evidence offered by the parties in support of their respective contentions as was noted upon submission and does not deem it

necessary to indicate separate rulings upon the numerous objections interposed by the parties upon taking of testimony, but as requested by the parties will indicate in this decree its rulings upon motions and pleading, and will also indicate its rulings upon such objections to the admission of testimony as are deemed by the Court to affect the material issues involved.

At the outset, the complainant filed motion that the Judge of the Circuit Court of Escambia County, Alabama, Equity Side, recuse himself from considering the evidence taken in the cause and from making a decision in said cause in order that a special judge might be appointed to render a decision in said cause. Upon submission of this cause the complainant argued said motion and the respondents argued their demurrers interposed thereto, and after hearing the arguments the Court is of opinion that said motion is not well taken and should be denied and that the respondents'demurrers thereto should be sustained.

The Court has considered demurrers interposed by complainants to the cross-bill filed by Ed Leigh McMillan, et als, as Trustees and Co-trustees under the trust agreement between D.W. McMillan and Ed Leigh McMillan, and is of the opinion that all of the relief prayed for in said cross-bill may be granted to said respondents under their answer to the bill of complaint, and the Court sustains the complainants' demurrers to said cross-bill.

The repondents Ed Leigh McMillan, et als, as Trustees under the trust agreement attached as Exhibit "A" to the bill of complaint amended their answer by adding paragraph ten by way of plea or defense, in which they set up as res adjudicata a decree of the County Judge's Court of Escambia County, Florida, and the complainants having filed demurrers thereto,

the Court upon considering said demurrers is of the opinion that the same are well taken and should be sustained. The Court in reaching its decision on the merits of the case has not considered the evidence offered in support of said plea of res adjudicata.

The complainants amended the bill of complaint by adding thereto paragraph thirteen designated as a special plea, and which sought to set us as res adjudicata a decree of the District Court of the United States for the Southern Division of the Northern District of Alabama; demurrers were interposed by respondents to said special plea, and subsequently the complainants amended said paragraph thirteen of the complaint and demurrers were again interposed by respondents to said amended paragraph. The Court is of the opinion that the demurrers to the original paragraph thirteen and to the amended paragraph thirteen are well taken and should be sustained, as the complainants have not set out sufficient of the record of said court to show that these respondents were parties to the litigation at the time the decrees attached as exhibits to said paragraph of the complaint were rendered, and it further appearing affirmatively from the amended paragraph thirteen that these respondents were not in fact parties to the litigation in the said District Court of the United States at the time of the rendition of said decree and cannot therefore be affected thereby. Demurrers to said original paragraph thirteen and amended paragraph thirteen are sustained and the testimony offered in support thereof has not been considered by the Court.

Complainants move to exclude and count for naught all evidence of their witness J. H. McCormick. It appearing that this testimony was not noted by the parties as a part of the testimony to be considered, complainants' said motion is granted and neither the testimony of J. H. McCormick nor the exhibits thereto have been considered by the Court in reaching its

decision on the merits.

The respondents objected to the competency of the complainant Florence McMillan Goodman as a witness in this cause on the ground that she is called upon to testify as to transactions with or statements by a deceased person whose estate is interested in the result of the suit when she has a pecuniary interest therein. It has been held by our Supreme Court, however, that one testifying that she is the common law wife of a decedent is not disqualified because of interest, and the Court therefore overrules this objection and has considered the testimony of this witness in arriving at its decision.

As respects the merits of the controversy, it is familiar law that the intention of the settlor should be the lode-star to the construction of such trust agreement as is involved in this case. The Court is of the opinion that it was never the intention of the settlor D. W. McMillan under the language of said trust agreement construed as a whole to make any provision for the complainant Florence McMillan (now Goodman) unless she should be living at the time of his death and unless she should be his wife at the time of his death. The Court reaches this conclusion without the aid of the supplemental declaration of the said D. W. McMillan to this effect. It being without controversy that the settlor D. W. McMillan had obtained a divorce from said complainant a short time before his death and that the parties had not thereafter entered into any ceremonial marriage, the burden of proof was upon this complainant to establish by satisfactory evidence that the parties contracted a common-law marriage after the rendition of said divorce decree. This burden of proof was not met by her but on the other hand the over-whelming proof, including her subsequent conduct and the letters admittedly written by her to D. W. McMillan shortly after her alleged common-law marriage negates a common-law marriage as it is recognized in this jurisdiction.

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The Court finds from the evidence, therefore, that the complainant Florence McMillan Goodman was not the widow of D. W. McMillan at the time of his death and has no interest in any part of the funds of the trust estate created by the instrument set out as Exhibit "A" to the bill of complaint, and that she is entitled to no relief as prayed for against the respondents to this cause of action.

As respects the complainant Frances Brodsky, who now appears from the evidence to the Frances Brooks, who was first made a party defendant and later by amendment made a party complainant, neither the allegations, the proof, nor the prayer of the bill of complaint will support a decree in her favor for any sum from said trust estate. While there is some testimony in the record that she suffered from a serious ailment and went to considerable expense in an effort to cure herself, it is nowhere made to appear that she was at the time "in want or needy circumstances" so as to call for the contribution of any income or profits from the trust fund for her proper support, comfort and well-being as provided in said trust agreement.

THE REGISTER OF THE COURT WILL ENROLL THE FOLLOWING DECREE:

This cause having been submitted for final decree upon motions, pleadings, proof and objections to the introduction of testimony as noted by the parties to said cause and filed by the Register upon submission for final decree, and the Court having considered the motions, demurrers, objections to testimony, and having considered only such relevant, material, competent and legal evidence as was offered by the parties in said cause, does order, adjudge and decree as follows:

1. It is ordered, adjudged and decreed by the Court that the motion of complainants that the Judge of this Court recuse himself from considering the evidence

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taken in the cause and from making a decision in said cause in order that a special judge might be appointed to render a decision in said cause, be and the same hereby is denied and that the demurrers of the respondents to said motion be and they hereby are sustained. To this action of the Court the complainants except.

2. It is ordered, adjudged and decreed by the Court that complainants' demurrers to the cross-bill filed by Ed Leigh McMillan, Malcolm McMillan, John David Finlay and Mary Ada Hoke as Trustees and Co-trustees under trust agreement between D. W. McMillan and Ed Leigh McMillan are well taken, and that said demurrers be and they hereby are sustained.

3. It is ordered, adjudged and decreed by the Court that the complainants' demurrers to the plea or defense set up by paragraph ten of the amended answer of Ed Leigh McMillan, Malcolm McMillan, John David Finlay and Mary Ada Hoke as Trustees and Co-trustees under trust agreement between D. W. McMillan and Ed Leigh McMillan are well taken, and that said demurrers be and the same hereby are sustained.

4. It is ordered, adjudged and decreed by the Court that the demurrers of the respondents Ed Leigh McMillan, Malcolm McMillan, John David Finlay and Mary Ada Hoke as Trustees and Co-trustees under trust agreement between D. W. McMillan and Ed Leigh McMillan to paragraph thirteen of the bill of complaint added by amendment, and the demurrers of said respondents to paragraph thirteen as amended, are well taken and that said demurrers be and the same hereby are sustained.

5. It is ordered, adjudged and decreed by the Court that the complainant's motion to exclude and hold for naught the testimony of the witness J.H. McCormick be and the same hereby is granted, and the respondents are allowed an exception to this ruling of the court.

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6. It is ordered, adjudged and decreed by the Court that respondents' objections to the competency of the complainant Florence McMillan Goodman as a witness to testify in this cause be and the same hereby is overruled and denied, and the respondents are allowed an exception to this ruling of the Court.

7. It is ordered, adjudged and decreed by the Court that neither the complainant Florence McMillan Goodman nor the complainant Frances Brodsky is entitled to any of the relief prayed for in the bill of complaint and amendments thereto as against any of the respondents to said cause, and that the claims of said complainants against said trust fund and the trustee and co-trustees under the trust agreement between D. W. McMillan and Ed Leigh McMillan be and the same hereby are rejected and denied. It is further ordered, adjudged and decreed by the Court that the bill of complaint and amendments thereto in this cause be and the same hereby are dismissed out of this Court, and that the respondents recover of the complainants their costs in this behalf expended, for the recovery of which let execution issue.

ORDERED, ADJUDGED AND DECREED, this 29th day of September, 1951.

F. W. Hare
JUDGE OF THE CIRCUIT COURT OF
ESCAMBIA COUNTY, ALABAMA, EQUITY
SIDE.

DECREE OF SUPREME COURT OF ALABAMA

August 27, 1952

THE STATE OF ALABAMA ----- JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

SPECIAL TERM 1952

3 Div. 629

Florence Goodman et al.

v.

Ed Leigh McMillan, as Trustee, et al.

Appeal from Escambia Circuit Court, in Equity

SIMPSON, JUSTICE:

The appeal challenges the construction placed by the trial court on two provisions of an irrevocable trust created by an instrument executed March 28, 1929, by the late D.W. McMillan, a wealthy physician of Pensacola, Florida.

The instrument provided that the administration of the trust should be transacted in a court of competent jurisdiction in Escambia County, Alabama. Ed Leigh McMillan, attorney of Brewton, Alabama, and cousin of trustor, was named the principal trustee and since the execution of the instrument has acted exclusively in that capacity.

The trust provisions under consideration are those designed at the time of the execution of the trust to benefit the trustor's then wife, Florence McMillan, and her daughter, Frances Brodsky, the appellants here, complainants below, who claim its benefits by the bill as last amended.

The instrument in so far as pertinent provided that after the trustor's death "and during the lives of my wife, Florence McMillan, (and others) . . . all net income and profit, so derived, shall by my said trustee or trustees be paid to the following named persons, in the following amounts, for the following times, and used for the following purposes:

> "(a) There shall be paid to my widow, Florence McMillan, the sum of one thousand dollars ($1,000.00) per month so long as she shall live and remain my widow.
>
> * * * * *
>
> "(d) In event that either of my cousins Ed. Leigh McMillan or Malcom McMillan, or any of the family or lineal descendants of either; or either of my stepdaughters, Annette Woods or Frances Brodsky, should during the continuance of this trust, be in want or needy circumstances, -- then in any of said events my trustee or trustees shall use and devote so much of said income and profits not otherwise divested as he or they may deem necessary or proper for the support, comfort and wellbeing of those or any of those so in want or in needy circumstances."

The trial court ruled that the complainants were not entitled to relief. We are in accord with

that decree. The two provisions will be discussed in order.

Provision (a)

This section of the instrument sought to make provision during the life of his "wife", Florence McMillan (now Goodman), so long as she should live and remain his widow. But Florence McMillan was not the trustor's wife at the time of his death in 1936 and therefore never could be his widow. He had previously obtained a divorce from her in 1933 in the chancery court of Escambia County, Florida, on the ground of adultery. That decree was affirmed on appeal by the Supreme Court of Florida, June 25, 1935. See McMillan v. McMillan, 120 Fla. 209, 162 So. 524. So the primary inquiry is whether appellant, after having been divorced from trustor in his lifetime, could take under subdivision (a) of the trust after his death as his widow. Posed in more judicial language, does an estate conditioned and limited to the survivorship of the settler's wife as his widow vest in her at his death when she was not then his wife by reason of a previous divorce a vinculo between the couple. Clearly, the authorities do not conduce to such a conclusion.

The first guiding rule is well recognized. The intention of the settlor is the law of the trust and if the nature, subject matter and objects are reasonably ascertainable and the scheme not inconsistent with some established rule of law or public policy, that intention must control and the courts will sustain and give it effect. - Stariha v. Hagood, 252 Ala. 158, 163, 40 So. 2d 85; Thurlow v. Berry, 249 Ala. 597, 32 So. 2d 526.

In appraising the intention of the settlor

here from the language of the instrument, in the light of ordinary knowledge of human affairs and relationships, none but the naive could believe that it was the intentions of the trustor that his unfaithful divorced wife should share in the benefits of the trust under provision (a) as his "widow" after his death. Unless the instrument learly imports such an intention, as it does not, the law, as we say, should not operate to that result.

The gift under (a) is not to Florence McMillan, "a widow" but to Florence McMillan, "the widow" of trustor, to continue during her said widowhood. Such a gift imports one because of and in consideration of the marital relation and clearly comtemplates the wife to be in lawful wedlock with him at her husband's death. - - 122 A.L.R. 116, n. 27; 18 A.L.R. (2d) 712; 35 Am. Jr. 354, par. 251, n. 4; Bell v. Smalley, 45 N.J. Eq. 478, 18 Atl. 70; Boddington v. Clairat, L.R. 25 Ch. Div. 685, 50 L.T.N.S. 761, 25 Eng. Rul. Cas. 489; Re Kettlewell, 98 L.T. N.S. (Eng.) 23; Iles v. Iles, 158 Fla. 493, 29 So. 2d 21.

The divorce between the parties severed the marriage relation and thereafter Florence McMillan was no longer the wife of Dr. McMillan. In contemplation of law each was then a single person and she could never thereafter (except by a subsequent valid marriage with him) have been his widow at his death. A widow in contemplation of law is a wife who outlives her husband, not an ex-wife who had theretofore been divorced from him. - Alabama Pension Commission v. Morris, 242 Ala. 110, 112, 4 So. 2d 896.

The Morris case gave that connotation to the term where the petitioner was claiming a widow's pension from a previously divorced husband.

The court observed:

> " . . . Petitioner was not entitled to claim as the widow of Moore, inasmuch as the marriage to Moore was dissolved by divorce before his death and she did not become his widow at his death. Code of 1940, Tit. 60, §7."

The uniform current of opinion has been harmonious to this view. Many authorities are collated in 45 Words and Phrases, Perm. Ed., under Titles "Widow", pp. 138 et seq., and "Wife," pp. 153 et seq., and it is not necessary to burden the opinion with these citations.

Another insistence is that a later executed will by trustor before his divorce, making mention of and approving subdivision (a) of the trust instrument, and a codicil thereto after the divorce revoking certain specific bequests to complainant in the will, but concluding "I hereby ratify and confirm my said last will and testament in all other respects," indicated an intention on the part of the testator that provision (a) still remain effective for his divorced wife. We do not so If these subsequently executed instruments could have affected the terms of the irrevocable trust or illustrated the intention of the trustor in that regard - a matter we need not decide - they are all too indefinite in verbiage to contradict another subsequently executed instrument by the trustor after his divorce which specifically explained that subdivision (a) was conditioned on the complainant's being in wedlock with him at his death and remaining his widow, and that the divorce had the effect of nullifying the estate thereby created.

To avert the effect of this construction, complainant through learned counsel advances as

an additional proposition to sustain the trust that about three years after the Florida divorce and some several months before Dr. McMillan died, these parties entered into a common law marriage in Alabama, thereby bringing her within the terms of the trust and permitting her to take as his widow. Much of the evidence in this rather voluminous record was addressed to that phase of the case. Here also, however, we must conclude with the trial court against the contention of complainant. The courts will closely scrutinize a claim of common law marriage (55 C.J.S. 911, § 45; Whitman v. Whitman, 206 Miss. 838, 41 So. 2d 22), and on the record presented we do not think the evidence sufficient to establish by that clear and convincing proof requisite in such cases that any such relationship ever existed between the parties.

The rule governing has been restated in many of our recent cases. There must be a mutual understanding to presently enter into the marriage relation, permanent and exclusive of all others, after which there is a public recognition of the existence of the common law marriage. There must be (1) a present agreement to take each other as husband and wife and (2) this must be followed by cohabitation or the mutual assumption openly of marital duties and obligations. - Jenkins v. Avery, Ala. Sup. Ct., MS, Oct. Term, 6 Div. 327; Whitworth v. Whitworth, (Ala. Sup. Ct.), 54 So. 2d 575; Turner v. Turner, 251 Ala. 295, 37 So. 2d 186; Murphy v. Jacobs, 249 Ala. 594, 32 So. 2d 306; Campbell v. Rice, 245 Ala. 395, 17 So. 2d 162; Gilbreath v. Lewis, 242 Ala. 510, 7 So. 2d 485.

Mere cohabitation and repute or circumstances which only show mutual consent of parties do not establish of themselves a common law marriage. There must be words of present assent

"per verba de praesenti" to lawfully contract marriage, followed by cohabitation or the open mutual assumption of marital duties and obligations. - Turner v. Turner, supra; In re Price's Estate, 129 Fla. 467, 176 So. 492; Whitworth v. Whitworth, supra.

A brief recital of the evidence bearing on this issue will suffice to illustrate there was no real common law marriage between this couple. Complainant does testify and this testimony is somewhat corroborated that she did cohabit with Dr. McMillan in Birmingham on the night of March 16, 1936, and one or two nights following in Montgomery, Alabama, and that Dr. McMillan introduced her in Montgomery as his wife. Here, however, the evidence is lacking to show definitely either prerequisite to establish a common law marriage. Complainant testifies that she was "reconciled" with her divorced husband and slept with him that night in Birmingham and later in Montgomery, but to be reconciled only implies - if that- a present agreement to take each other as husband and wife. As refuting any such claim the evidence is without dispute that on March 20, 1936, complainant and Dr. McMillan parted and were never together again. He lived several months after this, but she never saw or attempted to see him again. She never visited him during his fatal illness and did not attend his funeral. She was living in a rented house in Montgomery, Alabama, and he in his home in Pensacola, Florida, where previous to the divorce they had resided; yet she never sought to reestablish herself in that home as his wife. When she fell into financial trouble and her effects were attached for rent, she did not call on Dr. McMillan, whom she now claims to have been her lawfully wedded common law husband, but seemingly called on her erstwhile corespondent in the divorce suit, whom she thereafter married. She admits writing

Dr. McMillan three letters after this "reconciiliation," in which, among other things, she said that she intended to go her way and to let him go his and that they were to remain merely "friends." This she seems to have done. In one of these letters she requested that Dr. McMillan have her church membership changed from Pensacola, where he resided, to Montgomery, where she resided. She wrote of her intention to move to Atlanta to get a job and invited him to visit her there if he should happen to come through Atlanta. She also in her letters wrote and in her testimony spoke about trying to get positions to support herself. These acts are inconsistent with the theory of a common law marriage. In contradiction to her claim that the purpose of the meeting in Birmingham was for a reconciliation and a resumption of their marital relations, there is credible record evidence that the purpose of their meeting in Birmingham and later in Montgomery was for Dr. McMillan to obtain some of his household goods and effects which she had removed from his home following the affirmance of the divorce decree by the Supreme Court of Florida, and to procure the dismissal of a half-million dollar suit for breach of a prenuptial agreement she had filed in the federal district court in Birmingham. After this meeting she signed a settlement agreement and this suit was dismissed, and her several communications to Dr. McMillan indicated that she was attempting to have redelivered to him this property pursuant to the agreement. The documentary evidence all leads to but one conclusion, that this was the purpose of the meeting which brought the parties together. Then, after this meeting and parting, when creditors of complainant presented bills to Dr. McMillan for certain purchases of merchandise, he promptly denied liability, referring the creditors to the previous divorce decree. Neither of them ever referred to each other as husband and wife after the divorce decree or after the alleged reconciliation party in communications with the trustee, who had before the divorce been sending to her at Dr. McMillan's request $1,000 per month of the trust funds, nor did she ever

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indicate to the trustee that she and Dr. McMillan had entered into any common law marriage nor make any claim against him for any funds as the wife of the trustor. Nor did Dr. McMillan ever refer to complainant with any terms of endearment nor express any desire or purpose to see her or have her present at his last illness. On the contrary, he seemed to have shunned her and his deathbed instructions to his trustee were, "Don't let them put anything over on you and look out for forgeries," the latter admonishment evidently prompted by an experience he had with one J.H. McCormick, who had forged some documents to indicate a reconciliation and remarriage and who was proffered as a witness for complainant.

We have pointed out in previous decisions the exigencies which brought about recognition of the common law marriage. That considerations of public policy, to protect the family status in a frontier country, inspired the adoption of the rule. But courts have been careful to deprecate and view with disapproval a status not clearly shown to have been a bona fide one and in our present day the pioneer conditions which fostered the rule no longer obtain. Each case must be determined on its own particular facts, having regard to the situations of the parties and their status in life. A pertinent inquiry is to determine the attitude of the parties with respect to marriage and the common law relationship. If the parties had in times past or subsequent to the claimed relationship recognized or entered into the common law marriage, then this might have weight, but such is not the case here. Before complainant's marriage to Dr. McMillan she had been previously married in a ceremonial marriage. She and Dr. McMillan likewise had a ceremonial marriage. She has been married twice since his death, each time by a ceremonial marriage. She has two married daughters and their marriages were, each time, ceremonial. These circumstances likewise weigh against the attenuate claim of a common law marriage. The complainant in answer to

all this says that it was different with her and Dr. McMillan, since they had already been married, but we fail to appraise the distinction. It would seem to us to have been all the more essential to have had a ceremonial marriage, with that public recognition so requisite to establish such a status. These people were not frontier people without opportunities of ceremonial marriage, nor were they of that lower caste who might be insensitive to the propriety of any other status. They were gifted with refinement, talent, wealth, and an abundant knowledge of the world, and the court is unwilling to suppose that from the adumbrant and tenuous manner of their reunion they ever did undertake again the serious consequences of matrimony, from the bonds of which they had not so long been extricated and which had been originally cemented by a formal ceremony. The overwhelming proof negates the idea of a common law marriage as recognized in this jurisdiction.

Some argument is made that this matter of the common law marriage was res judicata because, after the death of the trustor, it was so adjudged in a proceeding in the United States District Court in a suit between complainant and her former attorneys involving establishment of an attorney's fee. There is not enough of these proceedings to determine the character of the litigation in which the attorney's fees were allowed and this was, of course, the complainant's burden. It does appear, however, that Ed. Leigh McMillan, the trustee, was made a party to the proceedings and later was dismissed from the litigation on his motion. The estate of the trustor does not appear to have been a party and whatever adjudication with respect to the matter might have been made in litigation between complainant and her attorneys was clearly ex parte and not binding on the trustee or the estate of the trustor. A plea of res judicata must show that the former controversy was between the same parties about the same subject matter and that

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the adjudication was upon the merits, and so much of the proceedings in the former case as is necessary to show such facts should be set out. - Lange V. Hammer, 157 Ala. 322, 47 So. 724.

It is also argued to sustain this provision of the trust that the limitation of the estate to the widowhood of the trustor's then wife was void in restraint of marriage or unenforceable as "in terrorem" and, therefore, cannot be given effect; that the disposition "to my widow Florence McMillan" is descriptive of the person and not designative of her status after his death and that, therefore, she is due to take. The provision is not subject to this construction. This is not a general limitation or condition in restraint of marriage, as has been sometimes denounced as in terrorem or void against public policy but is merely an estate to the trustor's widow during her widowhood and is approved by the authorities as valid. - Vaughn V. Lovejoy, 34 Ala. 437. See also 35 Am. Jur. 363, § 262.

Provision (d)

The contention here is that some money is due Frances Brodsky for an illness she suffered. This provision stipulates for payment to her of "income and profits" from the estate in the event she should "be in want or needy circumstances." Whether the trustee has an irrevisable discretion in this regard is not necessary to be decided. A sufficient answer to the contention is that there is no pleading or proof to bring into review this provision of the trust. There is evidence that at one time this party suffered from a serious illness and underwent considerable expense in an effort of cure. But there was no allegation of any needy condition or competent proof to that effect. Relief afforded by a decree must conform to the case made by the pleading as well as the proof, and the case wholly fails in this respect to authorize a decree

under subdivision (d). - Bain V. Howell, 25252 Ala. 458 (1), 41 So. 2d 588; Majors V. Killian, 230 Ala. 531 (11), 162 So. 289.

We think the decree below well suststained.

Affirmed.

Livingston, C. J., Foster, Lawson anand Goodwyn, JJ., concur.